

DIVISION III

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
ROBERT J. GLADWIN, Judge

CACR06-272

DECEMBER 20, 2006

DANNY CARTER

APPELLANT

APPEAL FROM THE PHILLIPS  
COUNTY CIRCUIT COURT  
[NO. CR-2003-44]

HON. HARVEY LEE YATES,  
JUDGE

V.

STATE OF ARKANSAS

APPELLEE

AFFIRMED

Appellant Danny Carter appeals the Phillips County Circuit Court's judgment and commitment order filed October 3, 2005, which revoked his suspended sentence for residential burglary. Appellant's three points on appeal include whether the trial court erred in allowing a witness to testify about the contents of a videotape viewed out of court; whether the witness's testimony about the contents of a videotape viewed out of court was hearsay; and whether there was sufficient evidence to revoke appellant's suspended sentence. We affirm.

On February 28, 2005, members of the Helena Police Department responded to a burglar alarm at the Perry Street Market in Helena. An investigation was conducted by Marlene Kalb of the Criminal Investigations Division. That investigation led to the arrest

of appellant, who was charged with commercial burglary and theft of property. At the time of his arrest, appellant was under a suspended sentence for a previous conviction of residential burglary. The State filed a petition to revoke his suspended sentence, and a hearing was held. At the hearing, Detective Kalb testified that she led the investigation of the burglary and reviewed a videotape at the store. The videotape showed a person in the store travel across the counter with his head down. The person then leaped back across the counter and turned to the side to exit the store. Detective Kalb testified that when she reviewed the videotape at the Perry Street Market, she was able to identify the appellant as the individual on the videotape. However, she also stated that the videotape played in court was sped up and difficult to stop at the exact time where the person in it looked at the camera, implying that the equipment at the store was more advanced than that used in court.

At the conclusion of the presentation of evidence, appellant moved to dismiss the petition for lack of sufficient evidence. That motion was denied, and the trial court determined that the appellant had violated the terms and conditions of his suspended sentence. Appellant was sentenced to fifteen years in the Arkansas Department of Correction, and this appeal followed.

Appellant's third point on appeal is that there was insufficient evidence for the trial court to revoke the appellant's suspended sentence. We must consider sufficiency challenges first in order to protect appellant's rights against double jeopardy. *Jester v. State*, \_\_ Ark. \_\_, \_\_ S.W.3d \_\_ (Sept. 21, 2006). To revoke probation or a suspension, the trial

court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation or suspension. Ark. Code Ann. § 5-4-309 (Supp. 2001); *Rudd v. State*, 76 Ark. App. 121, 61 S.W.3d 885 (2001). The State bears the burden of proof, but need only prove that the defendant committed one violation of the conditions. *Rudd, supra*. When appealing a revocation, the appellant has the burden of showing that the trial court's findings are clearly against the preponderance of the evidence. *Id.* Evidence that is insufficient for a criminal conviction may be sufficient for the revocation of probation or suspended sentence. Since the determination of a preponderance of the evidence turns on questions of credibility and the weight to be given testimony, we defer to the trial judge's superior position. *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (2003).

Appellant claims that the testimony of Detective Kalb was insufficient to show that appellant had violated the conditions of his suspended sentence. Excluding Detective Kalb's attempt to identify him as the person on the videotape, he argues there was no testimony connecting him to the burglary. He states that some evidence was exculpatory. For example, Detective Kalb testified that another officer, Captain Lovell, had seen appellant earlier that night dressed in a light-colored jacket and light-colored hat. However, appellant claims that the report of yet another officer, Dennis Cox, as well as the videotape, show an individual wearing a dark-colored hat. Appellant argues that even though Detective Kalb was sure that appellant was the individual on the videotape while she was testifying, during

her investigation she had developed another suspect with similar characteristics. Therefore, the videotape is the key piece of evidence in this case.

Appellant argues that the videotape is insufficient to support a revocation because the State was not able to display its evidence to the court. He contends that because the State was unable to display the video frames where it claimed appellant could be identified, its petition to revoke suspended sentence should have failed. Essentially, appellant contends that the lower court relied on Detective Kalb in finding that appellant had violated the terms of his suspended sentence. Appellant argues that that finding was not supported by a preponderance of the evidence.

The State argues that there was sufficient evidence showing that appellant had violated a condition of his suspended sentence, and the trial court did not err in revoking his suspended sentence. We agree. In addition to Detective Kalb's testimony concerning the videotape, she testified about her investigation into appellant's written statement to the police. Despite an alibi, the officer's identification of the burglar on the videotape is more than probable, as the appellant's face was visible on the videotape of the burglary. Further, Detective Kalb testified about the discrepancies she found in the appellant's alibi during her investigation. As this court will not reverse the trial court's decision to revoke a suspended sentence unless it is clearly against the preponderance of the evidence, the appellant's revocation and sentence are affirmed.

Appellant argues that the trial court erred in allowing Detective Kalb to testify about the contents of a videotape viewed outside of court because the State was unable to display that portion of the videotape in court where appellant was allegedly identified by Detective Kalb. Consequently, appellant argues that this testimony should have been excluded by the trial court because it referred to a recording viewed outside of court. He alleges that any showing of the videotape using different equipment or under circumstances not reproduced in court would be tantamount to a separate recording. That separate recording was neither available to the appellant nor was it available to the trial court for review. The best evidence rule provides that the original recording is required, unless excluded by statute or rule. Ark. R. Evid. 1003 (2005).

Appellant further argues that the testimony regarding the contents of the videotape viewed outside of court was hearsay. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Ark. R. Evid. 801(c) (2005). Appellant claims that Detective Kalb's statement that she identified appellant as the perpetrator after reviewing the videotape outside of court was offered for the truth of the matter asserted. However, appellant argues that the State was not able to produce any portion of the videotape that positively showed appellant or any other identifiable person as the perpetrator at the hearing. Appellant contends that Detective Kalb's testimony that she viewed the videotape on different equipment at the store and could positively identify appellant was hearsay.

A trial court's ruling on the admissibility of evidence is entitled to great weight and will not be reversed absent an abuse of discretion. *Harmon v. State*, 340 Ark. 18, 8 S.W.3d 472 (2000). In *Felix v. State*, 20 Ark. App. 44, 723 S.W.2d 839 (1987), this court held that the rules of evidence are not applicable in revocation proceedings. Ark. R. Evid. 1101(b)(3) (2005). Therefore, the trial court did not abuse its discretion in admitting the evidence objected to on the basis of the best evidence rule and hearsay. Accordingly, we affirm.

Affirmed.

PITTMAN, C.J., and ROBBINS, J., agree.